85-726

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985
NO._____

John G. Barlow; Charles Cap; Albert; Gerard; Francis L. Hoppa; Walter Mister; George Nocar; Raymond; Pritchard; Charles F. Rieger; John Sammeth; Charles L. Townsend; and Leonard N. Wachter,

Petitioners

Brewery Workers Local Union No. 1010; John J. Schaefer and Charles V. Bye, Maryland National Bank, Carling National Breweries, Inc.; G. Heileman Brewing Company, Inc.; The F&M Schaefer Brewing Company; The Zamoiski Beverage Company; Jos. Schlitz Brewing Company; The Winner Distributing Company; The Bond Distributing Company; Terminal Distributing Company; The Brewers Welfare Plan; Thomas J. Boyle; Charles J. Dauer; James A. Gardner; William C. Geho, Sr.; Stanley H. Haas; George H. Hocker; Edward Jankiewicz; Ronald Meliker; James W. Ross; Phyllis Stumbaugh; Charles Thomas and Ronald E. Ziebell,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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Question Presented

Does judicial approval of a class action settlement violate the due process clause of the Fifth Amendment where:

(a) The settlement involves distribution of the remaining assets of an employee welfare benefit plan to all the employee beneficiaries with a full share to each active employee and one-third share to each retired employee?

(b) The judge rejects the claim of retired workers who object to the settlement and allege they have vested rights to unpaid medical benefits that are obligations of the welfare plan, and denies their request for an evidentiary hearing and discovery to prove their claim?

(c) The proponents of the settlement offer no evidence in support of the settlement at the hearing on approval of the settlement?

(d) There are obvious conflicts within the class between retired and active employees and no showing of adequate representation?

(e) The judge has been involved in the settlement process and relies on his previous interaction with the settling parties in support of the settlement?

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO._____

JOHN G. BARLOW et al.

Petitioners

vs.

Brewery Workers Local Union No. 1010 et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fourth Circuit rendered in these proceedings on June 6, 1985

Opinions Below

On February 29, 1984, the United States District Court for the District of Maryland issued a final order approving a proposed settlement of this class action, without opinion. On July 5, 1985, the United States Court of Appeals for the Fourth Circuit entered judgment, with an unpublished opinion, affirming the order of the district court. This opinion appears at A-1.

Jurisdiction

The judgment of the court of appeals was entered on June 6, 1985, and rehearing denied on July 5, 1985. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES
Amendment Fifth

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Statement of the Case

1. Nature of the case

This class action was brought on behalf of employees at a number of brewing companies in the Baltimore area, including F&M Schaefer Brewing Company ("Schaefer Brewing"), who were members of the Brewers Welfare Plan

("the welfare plan"). The complaint claimed that Maryland National Bank ("the bank"), trustee of the welfare plan, had improperly diverted assets of the welfare plan belonging to the employees, to the benefit of the employers. Jurisdiction was alleged under Section 502(e) of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C.A., Section 1132. Settlement involved distribution of a fund among all members of the class.

The petitioners are members of the class. They had their own case against Schaefer Brewing, started before the class action, claiming that Schaefer Brewing owed them welfare benefits. They filed objections and appeared at the hearing in opposition to the proposed settlement.

The petitioners contended that they had a vested claim to money being paid into the settlement fund by Schaefer Brewing because Schaefer Brewing owed them specific unpaid

welfare benefits. They contended the proposed class representatives were inadequate to represent their interests. They also opposed being bound by the release being granted Schaefer Brewing in connection with the settlement because it would impair their own case against Schaefer Brewing. The trial court overruled their objections and denied their request for exclusion from the settlement class.

2. Relevant Facts

The petitioners each had thirty or more years of service with Schaefer Brewing. They each retired under a provision of their pension plan about August 1978 in connection with Schaefer Brewing closing its Baltimore plant. Their collective bargaining agreement provided that they and their eligible dependents were entitled to paid up medical insurance until they became eligible for medicare:

> "When an employee retires under any provision of the Pension Plan, the 365 day Blue Cross/Blue Shield Plan "C" Family plus Diagnostic No. 4 and Major medical coverage will be continued for the Employee and eligible dependents until the Employee is eligible for Medicare. In addition, these benefits will be continued for the eligible dependents until they are eligible for Medicare or are otherwise no longer eligible as a dependent."

The petitioners' medical insurance was also an obligation of the welfare plan, which was formed by a group of brewing companies, including Schaefer Brewing, in 1951. The welfare plan provided life and health benefits to employees through private insurance carriers. The bank, as trustee, received contributions from each participating employer and paid the required premiums. The welfare plan was incorporated in petitioners' collective bargaining agreement:

> "The Welfare Plan established under a previous Agreement shall be continued in accordance with the terms and conditions specified in a certain Trust Agreement between the parties, dated July 19, 1951, as

> amended. It is specifically agreed that any surpluses accumulated in the Trust Fund provided in said Trust Agreement in the form of employee contributions, rebates, dividends, interest or otherwise, shall be applied for additional benefits for the employees."

Schaefer Brewing refused to provide the petitioners with the promised medical insurance. The petitioners commenced suit against Schaefer Brewing in the United States District Court for the Eastern District of Pennsylvania on August 1, 1982, inter alia, under 29 U.S.C. Section 185 of the National Labor Relations Act, claiming that Schaefer breached the collective bargaining agreement by failing to pay the promised medical insurance benefits. The petitioners did not name the bank or the welfare plan as parties to their action since they did not know there were any assets remaining in the welfare plan. The petitioners' action was transferred to the district of Maryland at Baltimore, on December 7, 1982. The petitioners' case is still in the pretrial phase.

On December 10, 1982, this action was started by the local union representing the employees of the brewing companies, and the union president and another individual who were purportedly participants in the welfare plan. The case was started as an individual action. The complaint alleged that the bank breached its fiduciary duties by distributing welfare plan assets resulting from insurance rebates, to the employers. The case sought restoration of the diverted monies to the welfare plan together with punitive damages. The bank raised affirmative defenses and filed a third-party complaint for indemnification against the employers who received the distributions.

In its third-party complaint, the bank admitted that from 1977 through 1983, it received partial refunds of insurance premiums previously paid for employees insurance under the welfare plan. These refunds were made to reflect the insurers'

favorable experience on the individuals covered under the welfare plan insurance policies. Insurance refunds totalling about $350,000 were distributed to the employers during the period 1977 through 1979. The bank retained about $68,000 in insurance refunds. The bank did not intend to distribute this money until a final decision was rendered in the case.

Before the action matured to any significant degree, all parties indicated a willingness to settle the dispute. Thereafter, the dispute was referred to another district judge (the settlement judge) who, during the ensuing nine months, presided over three settlement conferences.

About December 1, 1983, the parties to this case entered into a settlement agreement, providing: (1) that the action be amended to become a class action under F. R. Civ. P., Rule 23(b)(2), as part of the settlement; (2) that defendants jointly

provide a fund of $160,000 in full and final settlement of all claims by plaintiffs and the class; (3) that, subject to court approval, the attorney for the class be paid $20,000 as reasonable counsel fees, together with possible additional fees; and, (4) that the balance of the settlement fund be distributed to the members of the class who were participants in the welfare plan as of June 30, 1979, one equal share to be distributed to each participant who was then in the active service of his employer and one-third of a share to each participant who was then retired. The parties estimated that a full share would be worth $281.

The parties had a conference about their settlement agreement with the settlement judge on December 1, 1983. The judge granted leave to plaintiffs to file an amended complaint, making the case a class action, and provisionally approved their settlement.

Petitioners' own case about welfare

benefits was started about six months before this action. The same attorneys represented Schaefer Brewing in the petitioners' case and in this action. Nonetheless, petitioners were not told about the existence of this action, and were not included in the settlement discussions about distribution of the welfare fund assets. Petitioners first learned about this action and its proposed settlement at the time notice was being mailed to the class.

Petitioners filed timely written objections to the settlement (A14). They objected to the form of the release because it would impair their rights in their own case against Schaefer Brewing. They objected to the method of distribution of the fund because their vested rights to medical insurance payments, which were obligations of the welfare plan, were being ignored, while others received a windfall distribution. They objected to the adequacy of the class representatives because they did not have the

same interests as the class of Schaefer Brewing employees. They reserved the right to state further objections at the settlement hearing. They elected to conditionally opt-out of the settlement in the event that their objections were not sustained.

Hearing on the proposed settlement was held before the settlement judge on January 20, 1984. The proponents of the settlement did not submit affidavits in support of the settlement or of the $20,000 in agreed upon counsel fees in advance of the hearing. At the hearing, the proponents of the settlement did not offer any evidence in support of the settlement or of the agreed upon counsel fees. They presented no witness and offered no affidavit or other evidence. They presented no affidavit or other evidence as to mailing of notice of the hearing to the class.

The judge asked counsel for objectors to state their objections. Counsel said there

was a question of adequacy of representation because the purported class representatives never worked for Schaefer Brewing where workers had different interests than the other employees. He moved that petitioner John Barlow, who was in court, intervene in the action, as the representative of the subclass of the Schaefer Brewing workers, and that the proposed method of distribution be changed so that the money Schaefer Brewing was contributing to the settlement would be used only to satisfy the claims of the subclass of Schaefer Brewing workers. He moved that Schaefer Brewing and the bank answer interrogatories as to the total amount of rebates received so that the fairness of the settlement could be evaluated. He moved for an evidentiary hearing so that petitioners could establish their claim of vested welfare plan rights.

The settlement judge ruled that the information sought by the interrogatories was irrelevant. He ruled against the request for

an evidentiary hearing, on the basis that there was no need for additional information beyond the complaint and its exhibit, the 1966 welfare plan document, to adequately address whether the proposed settlement was fair to the class. The judge overruled the objections as to the scope of the release. He rejected the claim that the petitioners had special rights to the insurance rebates that Schaefer Brewing had received. He found there was no interest of Schaefer Brewing employees, which entitled them to be made a distinct and different subclass and that it was irrelevant that none of the representative class plaintiffs were employed by Schaefer Brewing.

He found the class proper and denied petitioners' request to opt-out if their objections were not sustained. The judge, in approving the settlement, said:

> "I find that this has been a thoroughly hardworking and fairminded group who have negotiated out an arms length settlement on behalf of the

totality of the class, and it seems perfectly clear to me that this has been a fair settlement which is arrived at. There have been notifications to the various class plaintiffs, and I find that the settlement which is proposed is in its terms fair."

The judge signed a final order approving the settlement on February 29, 1984.

3. Decision Below

In affirming the order of the district court, the court of appeals held:

a. The settlement judge's failure to make detailed findings when approving the settlement did not require reversal. The court said (A8):

"While we acknowledge that the district judge could have been more thorough, (cf. In re Corrugated Container Anti-trust Litigation, 643 F.2d 195 (5th Cir. 1981), cert. denied, 456 U.S. 998 (1982); Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976)), we are satisfied that the case is simply another example of how it is impossible to please everyone. Given his rather intimate view of the merits, the

district judge properly approved the settlement".

b. The petitioners' claim of unfairness in the method of distribution did not require reversal. The court said (A10):

> "The objectors also argue that the terms of the settlement particularly are unfair to them, as former Schaefer workers. The claimed unfairness stems from a term in a 1976 collective bargaining agreement, which provided that surpluses accumulated in the Welfare Plan 'shall be applied for additional benefit for the employees.' The provision is claimed to give the objectors the right to collect, dollar for dollar, the amount Schaefer contributed to the settlement fund. The record reflects, however, that the district judge considered the objection, determined that the Welfare Plan was a collective unified trust (not an aggregate of individual welfare plans as alleged by the objectors) and concluded that the money contributed to the settlement by Schaefer did not 'belong' to the Schaefer workers. Moreover, the district judge properly reasoned that a collective dispute should be resolved through a common fund, equally distributed."

c. The defects in class representation did not require reversal. The court said (A9):

> "In addition, we hold that the defects in class representation noted by the Barlow group are insufficient to disturb an otherwise fair settlement. See In re Chicken Antitrust Litigation, 669 F.2d 228, 236-37 (5th Cir. 1982)."

The court of appeals did not address the issue that there was no evidence introduced in support of the settlement approved by the district judge. Instead, the court of appeals made its own findings of disputed facts without evidence, to justify approval of the settlement. The court of appeals made findings and conclusions by referring to a purported welfare plan document, which was attached as an exhibit to the amended complaint. The amended complaint was not verified. The attached welfare plan document did not appear current. The document was titled "COMPOSITE BREWERS WELFARE PLAN AND ALL AMENDMENTS THERETO UP TO AND INCLUDING THE AMENDMENT DATED AUGUST 25, 1966".

The court of appeals did not address the due process issues raised by petitioners in

the denial of their claims to a vested interest in the welfare fund without affording them opportunity for discovery or an evidentiary hearing.

Reasons for Granting the Writ

I. The decision below is at variance with decisions of this court and other circuit courts of appeal.

A. The court of appeals held that petitioners' claim of vested rights in the assets of the welfare fund could be determined without evidence or granting their request for an evidentiary hearing and discovery. This is contrary to Mullane Special Guardian v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and other decisions of this court interpreting the procedural safeguards required by due process and fundamental fairness in any final adjudication of property rights. Retired

beneficiaries vested rights in a welfare fund cannot be abridged without their consent. Allied Chemical & Alkali Workers, Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 181 (n. 20) (1971).

The court of appeals excused the absence of evidence and findings on the basis of the judge's "rather intimate view of the merits" gained during his nine months involvement with the parties in the settlement process. But, due process requires that class members be afforded an impartial tribunal at the settlement hearing. In Re Murchison, 349 U.S. 133 (1955).

A number of other circuits hold that orders approving class action settlements should be vacated where the trial court denied objectors opportunity for an evidentary hearing or discovery. Cohen v. Young, 127 F.2d 721 (6th Cir. 1942); Saylor v. Lindsley, 456 F.2d 896 (2d Cir. 1972); Sertic v. Cuyahoga, Lake, Etc., Carpenters

Dist. Council, 459 F.2d 579 (6th Cir. 1972); Greenfield v. Villager Industries, Inc., 483 F.2d 824 (3rd Cir. 1973); Girsh v. Jepson, 521 F.2d 153 (3rd Cir. 1975).

B. The court of appeals upheld the adequacy of the class representation where there was a showing by the petitioners of conflicts within the class and lack of adequate representation.

This court has held that the proposed class representative must be a member of the class and possess the same interests and suffer the same injuries as other class members. General Telephone Company of the Southwest v. Falcon, 102 S. Ct. 2364 (1982). Due process mandates that the representative not have interests that are inconsistent with or in conflict with other members of the class. Hansberry v. Lee, 311 U.S. 32 (1940).

The requirements for adequacy of representation were not met. This action was

originally filed as an individual action by the union, its president, and one Mr. Bye, identified in the complaint only as a person entitled to participate in the welfare plan.

At the time that the settlement judge provisionally certified the class, there were serious questions as to adequacy of representation. The union could not be a class representative since it was not a member of the class. General Telephone Company of the Southwest v. Falcon, supra. The union president was not adequate since the bank was raising defenses against him that would not apply to other members of the class. The bank said (seventh and eighth defenses): (1) that any losses caused to the plan were due to the union president's negligence; and, (2) that plaintiffs were estopped from seeking relief because the union president approved or should have known of the return of rebates to employers.

This left only Mr. Bye as a possible

class representative. The origins of his interest in the welfare fund were unspecified. Assuming that he was a member of the class, he was either a retired or an active employee. The method of distribution proposed gave the retired employees a one-third share and the active employees a full share. The active and the retired employees had conflicting interests. At the least, the judge should have required a representative of both active and retired employees, in connection with provisional certification of the class.

The proponents of the settlement did not call either the union president or Mr. Bye as witnesses to establish their adequacy. No affidavit was submitted by either to establish his qualifications. In fact, the record established that the union president could not be a representative since he was not a member of the class. The class attorney said at the hearing:

"John Schaefer, who was

president of the union at the time, is on the seniority list of the Beltway Plan of the brewery, and he won't participate in this money at all. Just one of the three plaintiffs will get any of the money at all."

II. The court below has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this court's power of supervision.

The proponents of the settlement introduced no evidence. They filed no affidavits in support of the settlement, presented no witness and offered no other evidence. The class action complaint was not verified and its exhibit, the 1966 welfare plan document, was not authenticated. Petitioners' allegations in their written objections, that they had vested rights in the remaining assets of the welfare plan should have been accepted as true. Conley v. Gibson, 355 U.S. 41 (1957).

The petitioners only source of redress

for vested medical welfare benefits may be their claim of entitlement to be paid from the welfare funds that are being distributed in this case. A direct action against the employer by workers seeking retirement benefits may fail where there is no money in the trust fund to pay the benefits. United Steelworkers v. Crane Co., 605 F.2d 714 (3rd Cir. 1979). Their vested rights to paid up medical insurance are worth thousands of dollars each. They will receive about $90 each under the settlement, while others with no claim to welfare benefits will receive a windfall distribution.

The court of appeals' determination that the welfare plan is a collective unified trust instead of an aggregate of individual welfare plans enhances the petitioners vested rights which would extend to the entire trust fund and rebates instead of some lesser allocation to Schaefer Brewing.

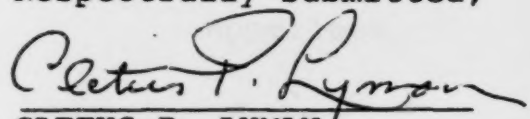
The decision below upholds class action

settlement practice where the hearing afforded to class members becomes a mere formality for the judge to endorse the agreed-to settlement. Class members are denied their due process rights guaranteed under the Fifth Amendment for a meaningful hearing where evidence is presented by the proponents of the settlement and where class members have opportunity for cross examination or to provide competing evidence. Endorsement of such a procedure presents a grave threat to the rights of class members in future class actions.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-1408

In Re:
Brewery Workers Local Union No. 10.10;
John J. Schaefer and Charles V. Bye,

Appellees,

Versus

Maryland National Bank,

Appellee,

Versus

Carling National Breweries, Inc.;
G. Heileman Brewing Company, Inc.;
The F&M Schaefer Brewing Company;
The Zamoiski Beverage Company;
Jos. Schlitz Brewing company;
The Winner Distributing company;
The Bond Distributing Company;
Terminal Distributing Company;
The Brewers Welfare Plan;
Thomas J. Boyle; Charles J. Dauer;
James A. Gardner; William C. Geho,
Sr.; Stanley H. Haas; George H. Hocker;
Edward Jankiewicz; Ronald Meliker;
James W. Ross; Phyllis Stumbaugh;
Charles Thomas and Ronald E. Ziebell,

Appellees.

John G. Barlow; Charles Cap; Albert Gerald; Francis L. Hoppa, Walter Mister; George Nocar; Raymond Pritchard; Charles F. Rieger; John Sammeth; Charles L. Townsend and Leonard N. Wachter,

Appellants.

Appeal from the United States District court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge; Norman P. Ramsey, District Judges. (C/A 82-3552).

Argued: April 2, 1985, Decided: June 6, 1985

Before RUSSELL, MURNAGHAN and Ervin, Circuit Judges.

Richard A. Ash (Cletus P. Lyman; Lyman & Ash; Daniel F. Goldstein on brief) for Appellants; William A. Snyder, Jr. (Elizabeth P. Blue; Ober, Kaler, Grimes & Shriver; Norman R. Buchsbaum; David W. Parsons; Donald W. Savelson; Marvin P. Sklar; Jay N. Varon on brief) for Appellees.

PER CURIAM:

Eleven former employees of the F&M Schaefer Brewing company appeal from an order by the United States District Court for the District of Maryland approving settlement of a class action suit against the Maryland National Bank.

The bank was trustee for an employee welfare plan known as the "Brewer's Welfare Plan". Formed by a group of brewing companies in 1950, and subsequently amended, the Welfare Plan provided life and health benefits to employees through a private insurance carrier. The trustee received contributions from each participating employer and paid the required premiums until June 30, 1979, when the trust agreement expired. Beginning in 1977 and continuing through 1979, the bank received partial refunds of paid-in premiums totalling

approximately $350,000.[1] The rebates represented, essentially, overpayments by each participant -- the result of a favorable rate of filed insurance claims. The trustee, following directions from the oversight committee, made pro rata distributions to each employer.

The local union representing the employees, along with two other named plaintiffs, eventually filed an action against the bank, alleging that the refunds should have remained in trust for the benefit of the employees. Breach of a fiduciary duty and violations of certain terms of the Brewers Welfare Plan formed the basis of the complaint.[2] The bank raised thirteen

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1. Additional funds, totalling $68,000, were received by the trustee but not distributed when litigation seemed imminent.

2. A companion declaratory judgment action was filed on behalf of the plan itself. See Brewers Welfare Plan v. Brewery Workers Local Union No. 1010, No. Y-82-3714 (D. Md. filed December 23, 1982).

affirmative defenses and filed a third party complaint, for indemnification, against the employers who received rebates.

Before the actions matured to any significant degree, all sides indicated a willingness to settle the dispute. Thereafter, the dispute was referred to another district judge who, during the ensuing nine months, presided over three settlement confrerences. Following the last conference tentative approval was given to a proposed settlement. The order (1) preliminarily certified a class consisting of all employee participants in the Welfare Plan as of June 30, 1979; (2) approved the establishment of a $160,000 settlement fund by the participating employer defendants; (3) awarded a full share (approximately $281) to each plaintiff in "active service" as of June 30, 1979 and a one-third share to each plaintiff who had retired by the same date; and (4) approved a release of all claims arising out of the litigation. Notice of the

proposed settlement was sent to members of the class.

John G. Barlow and ten other former employees of the F&M schaefer brewing Company are the sole objectors on appeal. The Barlow group has been in litigation with Schaefer since August 1982 over pension benefits secured by various collective agreements. Following an August 1978 plant closing and the company's termination of pension benefits allegedly guaranteed to workers who retired under the contract, the eleven workers filed suit seeking to restore benefits, including Blue Cross/Blue Shield coverage. Concern about the effect of the settlement on their pending case against Schaefer led the lawyer for the Barlow group to file three objections: (1) the proposed release of claim form was overbroad, (2) the distribution of funds was improper because any money contributed by Schaefer belonged solely to

the Schaefer workers,[3] and (3) the class representatives were not fair and adequate representatives for all class members. The group also sought to opt out of the settlement.

At the settlement hearing, the members of the Barlow group were invited to, and did, restate their objections. The Barlow group also moved to put on evidence and to compel discovery of the amount of Schaefer's contribution to the $160,000 settlement fund. The district court allowed a proffer,

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3. The objectors point to a provision in their 1976 collective contract, effective through June 30, 1979, which read:

> The Welfare Plan established under a previous Agreement shall be continued in accordance with the terms and conditions specified in a certain Trust Agreement between the parties, dated July 19, 1952, as amended. It is specifically agreed that any surpluses accumulated in the Trust Fund provided in said Trust Agreement in the form of employee contributions, rebates, dividends, interest or otherwise, shall be applied for additional benefits for the employees.

ruled that most of the evidence relied upon by the objectors was either part of the record or irrelevant, and denied the discovery request. The court overruled the objections and found that the settlement, the product of months of negotiations, was fair and just.

On appeal, the objectors contend that a remand is required because the district court did not make detailed factual findings when approving the settlement. In a related argument, the objectors state that approval should have been withheld because conflicts within the class -- particularly the absence of a retired worker as a named plaintiff -- rendered representation inadequate. While we acknowledge that the district judge could have been more thorough, (cf. In re Corrugated Container Antitrust Litigation, 643 F.2d 195 (5th Cir. 1981). cert. denied, 456 U.S. 998 (1982); Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir. 1975), cert. denied, 424 U.S. 967 (1976)), we are satisfied that the

case is simply another example of how it is impossible to please everyone. Given his rather intimate view of the merits, the district judge properly approved the settlement.[4] In addition, we hold that the defects in class representation noted by the Barlow group are insufficient to disturb an otherwise fair settlement. See In re Chicken Antitrust Litigation, 669 F.2d 228, 236-37 (5th Cir. 1982).

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4. The plaintiffs' success on the merits was by no means certain. On the one hand, there was a provision in the Brewer's Welfare Plan indicating that contributions were "irrevocable." In contrapose was a provision which specifically addressed contributions in excess of required premiums and which could be read as reserving to the oversight committee the discretion to distribute the excess funds to the employers. There is the further issue of whether, under the terms of the amended plan and subsequent labor negotiations, the employers had any obligations to purchase "additional" benefits with excess funds which, by definition, should never have been paid to the trustee in the first instance. The complexity of the litigation, with all its attendant expense and uncertainty, undoubtedly figured heavily in the decision to reach a settlement. The same considerations were also motivating the district judge.

The objectors also argue that the terms of the settlement particularly are unfair to them, as former Schaefer workers. The claimed unfairness stems from a term in a 1976 collective bargaining agreement, which provided that surpluses[5] accumulated in the Welfare Plan "shall be applied for additional benefit for the employees." The provision is claimed to give the objectors the right to collect, dollar for dollar, the amount Schaefer contributed to the settlement fund. The record reflects, however, that the district judge considered the objections, determined that the Welfare Plan was a collective unified trust (not an aggregate of individual welfare plans as alleged by the objectors) and concluded that the money contributed to the settlement by Schaefer did not "belong" to the Schaefer workers. Moreover, the district judge properly

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5. It was, of course, a tangled question whether an overpayment properly is definable as part of a surplus.

reasoned that a collective dispute should be resolved through a common fund, equally distributed.

Finally, the objectors contend that the settlement release will prejudice their pending lawsuit against Schaefer. We agree with the district judge that the release will not bar the objectors' separate dispute with Schaefer over rights conferred by the 1976 collective bargaining agreement. That lawsuit centers on the company's closing of the Baltimore plant and a subsequent refusal to provide retirees (a) pensions at a level allegedly guaranteed through July 1, 1979 and (b) Blue Cross/Blue Shield health benefits allegedly guaranteed until each retiree became eligible for Medicare. In contrast, the release approved by the district judge states that the settlement resolves all claims arising out of the management of the Brewer's Welfare Plan. As the district judge noted, settlement of the dispute over excess premiums, for past insurance benefits, has no

bearing on Schaefer's alleged future obligation under a collective bargaining agreement to continue funding vested pension benefits once it closed the Baltimore plant in 1978.

We have considered the objectors' other claims of error and find them to be without merit. Affirmed.[6]

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6. At oral argument, counsel for the appellees renewed an outstanding motion to supplement the record on appeal with material consisting of correspondence to the district judge who presided over the settlement negotiations. On consideration of the supplemental material, we have become satisfied that it properly should have no influence in our disposition of the appeal.

FILED JULY 5, 1985

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 84-1408

In Re: Brewery Workers Local Union No. 1010, et al., Appellees,

versus

Maryland National Bank Appellee,

Carling National Breweries, Inc., et al., Appellees,

John G. Barlow, et al., Appellants.

O R D E R

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Murnaghan for a panel consisting of Judge Russell, Judge Murnaghan and Judge Ervin.

For the Court,
/S/

JOHN M. GREACEN, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BREWERY WORKERS LOCAL UNION NO. 1010, et al.,	:	OBJECTIONS TO PROPOSED SETTLEMENT AND CONDITIONAL
Plaintiffs,	:	OPT-OUT
v.	:	CIVIL ACTION
MARYLAND NATIONAL BANK,	:	
Defendants.	:	NO. Y-82-3552

The persons identified on the list attached hereto as Schedule A (hereinafter collectively known as "Schaefer Objectors"), are all members of the purported settlement class.

Each of the Schaefer Objectors is a retired employee of the Baltimore facility of the F&M Schaefer Brewing Company, Inc. ("Schaefer"). Schaefer closed this facility in the fall of 1978. Each of the Schaefer Objectors had thirty years of credited service with Schaefer and each retired during the months of August through September, 1978, under the Schaefer Pension Plan.

The Schaefer Objectors take the following positions with respect to the proposed settlement:

OBJECTIONS

They object to the proposed settlement on the following grounds:

1. Objections to the form of the release

The proposed release is overbroad. It says:

> "The claims which have been or could have been asserted in this lawsuit or which arise out of or in any way relate to any facts, transactions, or other subject matter set forth, alleged or otherwise referred to in the complaints of this suit will be dismissed on the merits with prejudice to all members of the class."

The Schaefer objectors are plaintiffs in an action against Schaefer, which involves claims for benefits under the Schaefer Welfare Plan (Barlow, et al. v. Schaefer et al., U.S. D.C. D. Md. No. N-83-324, a copy of

the amended complaint is attached).

The present form of the proposed release could arguably bar the claims in the Schaefer Objectors own action. The release should be modified so it cannot impair unrelated claims by the Schaefer Objectors and other class members.

2. Objection to the method of distribution

The Brewers Welfare Plan that is the subject of the purported class action was not a collective plan but an aggregate of individual welfare plans sponsored by six unrelated corporations involved in various aspects of the brewing industry in the Baltimore Metropolitan area, including Schaefer. Any money being contributed by Schaefer to the settlement belongs solely to the former Schaefer workers under the terms of the collective bargaining agreement between Schaefer and its employees. That agreement says, at page 9 (copy of relevant

portions of agreement attached):

> "The Welfare Plan established under a previous Agreement shall be continued in accordance with the terms and conditions specified in a certain Trust Agreement between the parties, dated July 19, 1951, as amended. It is specifically agreed that any surpluses accumulated in the Trust Fund provided in said Trust Agreement in the form of employee contributions, rebates, dividends, interest or otherwise, shall be applied for additional benefits for the employees."

The Schaefer Objectors and the other Schaefer employees that retired under provisions of the Schaefer Pension Plan have first claim to any money due to the Schaefer Welfare Fund. They were entitled under their employment contract (page 10) to paid-up Blue Cross and Blue Shield for themselves and their dependents until each was eligible for medicare. Some of them, including the Schaefer Objectors, have not received this promised medical insurance.

3. Objections to the adequacy of the class representatives

To the best of the Schaefer Objectors knowledge, none of the proposed class representatives were employees with Schaefer or retirees under the Schaefer Pension Plan. They do not have the same interests as these classes of Schaefer employees. They cannot fairly represent these classes. The lack of adequacy of representation is made obvious by the proposed settlement which would distribute money belonging to the Schaefer workers among the entire class of welfare fund participants.

4. Further objections

The Schaefer objectors reserve the right to state further objections at the hearing scheduled for January 20, 1984, into the adequacy of the proposed settlement.

CONDITIONAL OPT-OUT FROM PROPOSED SETTLEMENT CLASS

The Schaefer objectors elect to opt-out of the proposed Settlement class, and not to

be bound by the terms of the settlement, under the following conditions:

a. if their objections to the scope of the proposed release and the manner of distribution of the proposed settlement fund are not sustained.

b. they also reserve the right to opt-out dependent upon information, which they have not yet been able to obtain. This information includes the total amount that Schaefer received in welfare fund credits from Maryland Bank and how much Schaefer is contributing to the proposed settlement fund. When the Schaefer objectors receive this information at the settlement hearing, they may elect to opt-out, so that they can pursue their own actions.

WHEREFORE, the Schaefer Objectors request that their objections be sustained after hearing, or that they be permitted to opt-out, depending on certain conditions.

Respectfully submitted,

/S/

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